COVAD
COMMUNICATIONS COMPANY

JUL 22 1999

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Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWD 204
Washington, DC 20554

July 19, 1999

Re: CC Docket No. 98-141

Dear Ms Roman Salas,

Enclosed please find an original and eight (8) copies of Covad Communications Company in the above-referenced proceeding.

Please date-stamp a copy and return to the courier.

If you have any questions, please don't hesitate to call.

Sincerely,

Thomas M. Koutsky /mett

Thomas M. Koutsky

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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee	)	CC Docket No. 98-141

COMMENTS ON SBC-AMERITECH PROPOSED CONDITIONS OF COVAD COMMUNICATIONS COMPANY

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Dated: July 19, 1999

SUMMARY

The June 29, 1999 announcement by the Commission of twenty-six proposed conditions marked, in Covad's opinion, a significant achievement for FCC Staff that would, if fully and faithfully implemented, provide significant public interest benefits due to the promotion of the competitive availability of advanced services. Unfortunately, the July 1, 1999 set of proposals made by SBC and Ameritech fall far short of the June 29 FCC Staff announcement. The one hundred, single-spaced pages filed on July 1 are riddled with caveats, contingencies, and conditions that vitiate many of the public interest benefits of the original June 29 Conditions. It is clear from the July 1 proposal that SBC-Ameritech intend to resist fully speedy entry into local telecommunications markets.

In order to assist the Commission in its public interest review of this proposal, Covad provides two types of comments. In Section I, Covad outlines three general issues raised by the SBC-Ameritech July 1 Proposal. In particular, the laggard implementation deadlines of several of the proposed commitment vitiate most, if not all, of the public interest benefits from those commitments. Second, several of the commitments improperly limit or unduly restrict the rights of CLECs – a result that cannot be implemented in this license transfer proceeding. Finally, in crafting these conditions, the Commission must heed the experience of state commissions and CLECs like Covad with regard to similar commitments and actions by SBC and Ameritech.

In Section II, Covad provides detailed comments on particular terms of the SBC-Ameritech proposals. In many areas, the proposals – if faithfully implemented without loopholes – represent significant steps forward in the development of competition. In particular, the advanced data services affiliate and focus of other provisions upon the

competitive provision of advanced services could, Covad believes, advance the deployment of competitive broadband services to American consumers, provided that the loopholes proposed by SBC-Ameritech are closed.

However, many of the SBC-Ameritech proposals are "rainbow" promises – when you look at them closely, they do not become any clearer and sometimes disappear entirely. Some "feel good" rainbow promises, when looked at closely, could actually be harmful to the public interest. For example, although the June 29 Conditions clearly said that the SBC-Ameritech ILECs will treat the advanced services affiliate "as they would any" CLEC, we find in Paragraph 34 that the advanced services affiliate will have "*exclusive*" access to DSL line sharing from the SBC-Ameritech ILECs for an indeterminate period of time. Giving the separate affiliate *any* method of access on an exclusive basis for any period of time is fundamentally inconsistent with the purpose of structural separation for advanced services. This period of exclusivity would give the separate affiliate a competitive advantage over data CLECs like Covad – especially with regard to serving households where no facilities for a stand-alone second line for data services exists.

In addition, in Paragraph 24/Attachment C, SBC-Ameritech offers "uniform" nonrecurring rates of over $1500 for conditioning an xDSL loop. In several SBC and Ameritech states, no charges are assessed for conditioning those loops, a result consistent with the Commission's TELRIC pricing rules. Commission acceptance of this proposal would be a considerable step backwards – the Commission would turn its back on TELRIC pricing of digital loops and also provide SBC-Ameritech license to impose

$1500-per loop charges region-wide, even where such per-loop conditioning charges are not assessed today.

Throughout Section II of these Comments, Covad provides several suggestions to improve these proposals. However, based upon SBC-Ameritech's demonstrated pattern of resisting competition and its attitude towards the regulatory process, Covad also urges that the Commission, (1) adopt final DSL line sharing rules in CC Docket No. 98-147 prior to or on the same date as an order in this merger proceeding (to avoid the competitive issues surrounding the "interim" line sharing solution proposed by SBC-Ameritech); and (2) require SBC-Ameritech to post a $1 billion bond to ensure compliance with these conditions. Only by taking these actions will the Commission be assured that the promises of the proposal translate into actual public interest benefits.

TABLE OF CONTENTS

Before the
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In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee	)	CC Docket No. 98-141

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The July 1, 1999 set of proposals made by SBC and Ameritech ("Applicants" or "SBC-Ameritech")[1] vividly demonstrate once again the attitude incumbent LECs ("ILECs") have towards the regulatory process and their legal obligations under the Telecommunications Act of 1996. Repeatedly, this Commission, state regulators, and competitive carriers like Covad battle to ensure ILEC compliance with the law, only to find that any progress soon becomes frozen by ILEC obstructionism and legalese.

The June 29, 1999 announcement by the Commission of twenty-six proposed conditions marked, in Covad's opinion, a significant achievement.[2] FCC Staff worked diligently for several months with Applicants to develop these twenty-six conditions, and these draft conditions – as described on June 29 – would provide substantial pro-competitive benefits to the deployment of competitive, advanced services.

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[1] Letter from Richard Hetke, Ameritech and Paul K. Mancini, SBC, to Ms. Magalie Roman Salas, Secretary, FCC, July 1, 1999, in CC Docket No. 98-141 ("July 1 Proposal"). References to paragraph numbers in these Comments refer to paragraph numbers in the July 1 Proposal.

[2] FCC, "Summary of SBC/Ameritech Proposed Conditions," June 29, 1999, http://www.fcc.gov/ccb/Mergers/SBC_Ameritech/conditions062999.html ("June 29 Conditions").

Unfortunately, SBC-Ameritech's July 1 detailed "proposal" is riddled with caveats, contingencies, and conditions that will vitiate many of the public interest benefits of the original June 29 Conditions. Indeed, enmeshed in SBC-Ameritech's 100 single-spaced pages of proposed conditions are nefarious intricacies and textual twists and turns that are about as easy to understand as a first read of a James Joyce novel.

What is clear from the plot line of SBC-Ameritech's July 1 draft is that SBC-Ameritech intends to fully resist the speedy entry into the market that the June 29 Conditions hoped to bring. This attitude continues a three year long pattern of delay and litigation with regard to ILEC implementation of the 1996 Act. SBC and Ameritech have morphed the June 29 Conditions into a Byzantine set of legal arcana with staggered time lines, "interim" measures, and staggered phase-ins of separate affiliate, performance standards, collocation, unbundling, and OSS requirements during the course of the three year term of the conditions.

In many cases, all that SBC and Ameritech have done here is promise to comply (on their own, phased-in terms, with umpteen caveats and exclusions) with existing or future Commission regulations in exchange for Commission approval of their merger. Even if such promises to comply with existing law could be regarded as a "public interest" benefit (which Covad disputes), these promises to comply eventually should not be heeded. Instead, the Commission must examine SBC-Ameritech's July 1 draft, compare it carefully to the June 29 Conditions, and come to its own independent determination as to whether SBC-Ameritech has faithfully proposed to implement the June 29 Conditions.

In order to assist the Commission in this review, Covad provides two types of comments. In Section I, Covad outlines three general issues raised by the SBC-Ameritech July 1 Proposal. In Section II, Covad provides detailed comments on particular terms of the legalistic SBC-Ameritech document. It should be noted that given the limited time afforded to parties like Covad to prepare these comments, Covad's Comments cannot be comprehensive and encompass all aspects. As a result, the failure to mention any issue with a proposed condition in these comments should not be taken as Covad's implicit, explicit or tacit approval of that particular condition.

I. THREE BROAD CRITIQUES

A. Delayed Implementation Timelines in the July 1 Proposal Vitiate the Public Interest Benefits of Several Conditions

SBC-Ameritech's proposed conditions generally expire in three years (*see* ¶ 68) but contain several layers of phase-ins and interim measures and timelines that must be met during those three years. Once the caveats and contingencies are finally satisfied, the conditions will expire almost immediately and all this work will be for naught. In the meantime, SBC and Ameritech will have a convenient excuse to refuse to engage parallel, pro-competitive FCC and state rulemaking proceedings, collaborative sessions, workshops, or interconnection arbitrations over these same points, because they will no doubt point to their Merger Conditions as the Alpha and Omega of their obligations.

Attachment 1 to these Comments presents a summary of several of the most important timelines in the July 1 draft, complete with specific dates of compliance. (Attachment 1 assumes a Merger Closing Date in September 1999.) Attachment 1 clearly shows that SBC-Ameritech's proposed implementation timelines clearly mitigate and vitiate potential public interest benefits of the federal performance parity plan (July 1

Proposed Condition I, June 29 Condition 5), uniform OSS (July 1 Proposed Condition III, June 29 Condition 6), OSS for Advanced Services (July 1 Proposed Condition VI, June 29 Condition 2), and nondiscriminatory access to line sharing (July Proposed Condition VI, June 29 Condition 1). Attachment 1 also demonstrates that SBC proposes that its SNET subsidiary in Connecticut generally get *more* time to come into compliance – yet Covad is aware of no record evidence in this proceeding that would support this type of special treatment for SBC's Connecticut ILEC subsidiary.

It is interesting to note that June 29 Conditions released by the Commission do not mention *any* such timelines for implementation of the conditions. To Covad's knowledge, Applicants have provided absolutely *no* evidence in the record to support these staggered timelines. These long phase-ins of these obligations substantially vitiate the pro-competitive benefits from several proposed conditions.

Indeed, Covad suggests that there might even be a serious public interest *harm* caused by these awkward and lengthy timelines. For example, the presence of a multistate "federal Merger Condition process" to implement OSS enhancements might cause states (or even the Commission) to refrain from undertaking similar, more pro-competitive and long-lasting efforts of their own during the next two to three years. Unless the Commission acts either to speed up these timelines *or* "toll" the appropriate merger condition, the proposals may only give SBC-Ameritech even more reasons to stall and delay compliance with the law.

B. SBC-Ameritech Proposals Raise Administrative Process Issues

In several areas, SBC-Ameritech's July 1 draft reads like a new "Modified Final Judgment" – an agreement between a decision-maker with jurisdiction over a regulated

entity and that regulated entity. The Commission is to be commended for placing the SBC-Ameritech proposal up for public comment, but that public comment process cannot change one unalterable fact: this proceeding (because it is a license transfer and not a general rulemaking proceeding) cannot affect the Commission's generalized rulemaking authority, and these conditions cannot affect rights and obligations of non-Applicants (including Covad and other CLECs).

In several areas, SBC-Ameritech tries to "pre-judge" the results of pending Commission proceedings. With regard to the provision of DSL line sharing (¶¶ 33-34), SBC-Ameritech state that they will only provide DSL line sharing if the FCC finds that it is "technically feasible" and that "the equipment to provide such line sharing becomes available, based on industry standards, at commercial volumes" (¶ 33). Even then, SBC-Ameritech will only "phase-in" compliance in 12 months. In the meantime, the SBC-Ameritech data affiliate will be permitted under Paragraph 34 to line share with the ILEC "on an exclusive basis."

SBC-Ameritech needs to be reminded that the *Commission* has authority to write the DSL line sharing rules and establish the methods in which SBC-Ameritech will implement those rules. In the March 31 *Second Advanced Wireline Services Order and Further Notice*,[3] the Commission tentatively concluded that DSL line sharing is technically feasible. SBC-Ameritech's proposal would flip that presumption and build in a presumption *against* the technical feasibility of line sharing. In addition, SBC-Ameritech's obligation to provide line sharing after the FCC orders line sharing simply

[3] *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, Second Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, (rel. March 31, 1999) ("*Second Advanced Wireline Services Order and Further Notice*").

cannot be contingent on whether the "equipment to provide line sharing" is "available, based on industry standards, at commercial volumes" – because such examinations are not to be found in the nondiscrimination principles of Title II, the definition of "technically feasible", or the test for defining unbundled network elements in Section 251(d)(2).

Indeed, it would be a patent violation of nondiscrimination principles for the Commission to grant the SBC-Ameritech data affiliate *any* "exclusive" access to DSL line sharing for *any* period of time. The "separate affiliate for advanced services" condition (No. 1) of the June 29 Conditions clearly states that the SBC-Ameritech ILEC arm "will treat the affiliate *as they would any competitor*." With regard to DSL line sharing, this phrase means what it says – if the separate affiliate has access to DSL line sharing, data CLECs like Covad must be given access to DSL line sharing as well. There is no room in the separate affiliate construct for the affiliate to have the "exclusive" ability to access customers via DSL line sharing.

Finally, the SBC-Ameritech proposal contain several provisions in which CLEC cost structure, rights, obligations, and remedies would be limited or affected. Covad believes that these limitations and intrusions on CLEC operations are procedurally improper. For example –

1. **Requirement that CLECs pay enormous conditioning costs – over $1500 per loop (¶ 24 and Attachment C).** These proposed conditioning charges are way out of line with what SBC provides in California. As discussed below, if the Commission accepts this proposal, it would turn its back on its fundamental and existing UNE pricing rules and would radically change the cost structure of data CLECs like Covad. And this would be done in a license transfer proceeding – not in a rulemaking with proper notice.

2. **Requirement that CLECs enter into "written agreement" to obtain direct access to SORD and similar existing UNE databases (¶ 12).** As long as ILECs directly access and use these databases to provide retail services that compete with CLEC offerings, CLECs like Covad are entitled to such access under both Title II and Section 251(c) to these databases *today*.

3. **Requirement (at CLEC cost) of Private Arbitration of OSS Enhancement Disputes (¶¶ 11.b, 14.b, and 16.b).** In "Phase II" of the various OSS Enhancement proceedings, CLECs that dispute SBC-Ameritech's plan will be *required* to participate in American Arbitration Association arbitration to resolve that dispute – and incur 50% of the costs of that arbitration. In addition, the arbitrators will not be neutral – the arbitrator is to be selected "in consultation with the subject matter experts selected from a list of three firms supplied by SBC/Ameritech." CLECs have no ability to participate in the selection of the arbitrator, and no appeal is contemplated of this decision by this arbitrator panel. Therefore, not only are CLECs asked to give up procedural rights, CLECs will be denied due process rights by having their OSS disputes resolved – without any right to an appeal – by an arbitrator from an SBC-Ameritech pre-approved list.

4. **Limitation on Availability of Interim Line Sharing (¶ 34).** SBC-Ameritech's proposed conditions would require CLECs to make a quarterly filing with the state commission if the CLEC seeks to take advantage of Interim Line Sharing and subject itself to an at-will audit by SBC-Ameritech (¶ 34(d)). In addition, this filing and audit are to ensure that the CLEC use a particular unbundled network element for a particular purpose – directly contrary to the clear language in Section 251(c)(3) the 1996 Act that unbundled network elements may be used by a requesting carrier to provide any "telecommunications service."

These are but a few examples where SBC-Ameritech's proposal would limit the rights of CLECs. Administrative practice dictates that CLEC rights and obligations cannot be adversely affected by this license transfer between two RBOCs.

C. The Commission Must Consider the Established Track Record of Noncompliance and Obstructionist Tactics by Applicants

If the Commission accepts the proposed conditions, it would be taking a leap of faith that SBC-Ameritech actually would comply with these conditions in good faith. Unfortunately, a different pattern has emerged in similar circumstances.

For example, SBC has recently sought to escape certain commitments it made with regard to its recent merger with Southern New England Telephone Corporation ("SNET"). As the Commission is aware, SNET had – prior to its merger with SBC – engaged in an aggressive cable "overbuild" strategy in Connecticut, a strategy that held the promise of providing Connecticut consumers with new competition in the market for multichannel video programming. When SBC acquired SNET, the Connecticut Department of Public Utility Control ("DPUC") required SBC to commit to maintaining SNETs level of capital investment, staffing, marketing, research and facility deployment proposed (and accepted by the DPUC) by SNET in its cable franchise agreement. SBC agreed to do so and the SBC-SNET merger proceeded.

On April 1, 1999, SBC applied to the DPUC to reduce its commitment to cable overbuilding.[4] SBC asked that its facility deployment commitment be reduced from its original commitment to serve 169 towns down to only the 26 towns that is currently serves or will serve shortly.[5] SBC cited the (apparent) "deterioration of HFC [hybrid fiber coaxial network] for telephony [since SNET's cable affiliate] filed its application with the Department" to justify this reduction. SBC also claimed that "the marketplace and technology changes in HFC since 1994 have turned the business case on its head."[6] Clearly, the SBC-SNET merger condition that SBC maintain SNET's aggressive cable overbuild program means very little to SBC's subsequent actions.

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[4] Connecticut DPUC Docket No. 99-04-02, *Evaluation and Application to Modify Franchise Agreement by SBC Communications, Inc., Southern New England Tel. Corp. and SNET Personal Vision, Inc.*, April 1, 1999.

[5] *Id.* at 25-26.

[6] *Id.* at 11, 16. SBC's statement before the DPUC are relevant as to whether cable should be seen as a "significant potential competitor" in SBC and Ameritech's local service markets.

A similar situation occurred with Ameritech in Indiana. As the IURC recently submitted in comments to this Commission, in return for relaxed regulatory standards, Ameritech Indiana agreed to spend $20 million annually for six years to connect schools, hospitals, and government centers. The IURC recently reviewed Ameritech's compliance with this promise and found that Ameritech had actually included investments in retail stores, an amusement park, and industrial plant and a hotel in Ameritech's spending in this program. The IURC found that in the first four years of the plan, rather than investing the promised $80 million, Ameritech had invested only $17.9 million in wiring schools, hospitals and government centers.[7]

Finally, SBC has clearly demonstrated a lax corporate attitude towards compliance with the regulatory process and compliance with the 1996 Act. For example, in Texas, Covad (along with Accelerated Connections, Inc. ("ACI")) is currently engaged in an interconnection arbitration with SBC's Texas ILEC subsidiary, Southwestern Bell Telephone Company ("SWBT"). This arbitration concerns core issues related to DSL deployment by CLECs, such as the methods by which CLECs will obtain nondiscriminatory access to xDSL-compatible loops, SBC's DSL spectrum management policy, and OSS (including access to fundamental network information).

SWBT's conduct in the Covad/ACI Arbitration involved numerous discovery abuses, which Covad and ACI discovered only in April, 1999, after the arbitration hearing began. Covad cannot describe all of SWBT's conduct in detail at this time because of a protective order that has been issued in the Covad/ACI Arbitration proceeding. However, it appears that SWBT engaged in an orchestrated campaign to

[7] IURC Comments at 4.

prevent Covad, ACI and the Arbitrators from obtaining and reviewing important information regarding the central issues in the arbitration.[8] Some of the publicly discussed violations include SWBT's:

(1) Failure to produce responsive, relevant documents, including SWBT's *ADSL & VDSL Methods and Procedures*, prior to the April 14, 1999 arbitration hearing. The mid-arbitration discovery of this document by Covad caused the Arbitrators to order an abrupt end to the hearings, order that discovery be re-opened, and reschedule the hearings for June.

(2) Failure to search for requested documents from SWBT employees developing and implementing its retail and wholesale DSL strategies.

(3) Delay in the production of critical documents during the re-opened discovery until after depositions were completed so that Covad could not question SWBT's witnesses about the documents.

(4) Offering as witnesses only members of SWBT's cadre of "professional" witnesses who are not directly involved in SWBT's DSL implementations; and

(5) Improperly redacting and withholding of documents to prevent discovery of information that may be contrary to SWBT's position. Some of the redacted documents include e-mails between SWBT and other BOCs about DSL methods and procedures.

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[8] Attachment 2 to these Comments contains a copy of the Direct Testimony of Clay Deanhardt, Covad, which was filed before the Illinois Commerce Commission on July 6, 1999. Mr. Deanhardt's testimony describes these actions by SWBT recounted in these Comments.

These discovery abuses have had a significant substantive impact upon the Covad/ACI arbitration. Covad and ACI have had to endure months of delay in final resolution of these matters and have spent hundreds of hours that should have been unnecessary. The conduct uncovered in the Covad/ACI arbitration demonstrates a callous or hostile SBC corporate attitude towards the truth-seeking function of the state commission process.

If the Commission decides to approve this merger with conditions, it must take into account the history of SBC's and Ameritech's conduct in crafting strong and enforceable conditions. Without strong enforcement, paper promises are apt to remain simply words on paper.

II. COMMENT ON SPECIFIC CONDITIONS

In this section, Covad provides substantive comment on several of SBC-Ameritech's July 1 proposal. In general, Covad believes that the SBC-Ameritech proposal does not faithfully implement the June 29 FCC Staff announcement, and Covad advises the Commission to undertake its own careful examination of the SBC-Ameritech proposal with that thought in mind.

Instead of faithfully proposing details around the original conditions, SBC and Ameritech have, in many instances, done something quite different. The SBC and Ameritech proposals contain a number of timelines, exemptions, contingencies, and various other twists and turns. Indeed, most of SBC-Ameritech's one hundred pages of single spaced proposals are devoted to legalistic limitations of the straightforward, five pages of June 29 Conditions. Many of these limitations actually represent SBC-

Ameritech backsliding from pro-competitive decisions made by the California, Michigan, Texas and Ohio commissions and do not represent region-wide "best practices" at all.

A. Federal Performance Parity Plan (Proposed Condition I)

Covad strongly supports uniform implementation of performance standards and imposition of penalties for non-performance by incumbent LECs. However, the original June 29 Condition No. 5 labeled the federal performance parity plan "Equal Treatment for All Competitors" and explicitly stated that the condition would ensure that SBC-Ameritech provide "the same level of service" to "all competitors." SBC-Ameritech's July 1 Proposal backs away from those commitments in several respects. SBC-Ameritech's faulty proposal undermines many of the public interest benefits of the plan.

1. Unexplained and Unreasonable Delays in Connecticut.

As Attachment 1 to these Comments demonstrates, Paragraph 2(b) grants SBC's SNET subsidiary (a Connecticut ILEC) considerably more time to come into compliance with the federal plan. SBC merged with SNET last year and, as discussed above, SBC has, to Covad's knowledge, provided no basis for excluding SNET from the general commitment to implement the performance measurements as soon as possible in Connecticut. SBC's silence on this issue leads Covad to question SBC's veracity in the SBC-SNET docket that efficiencies would be gained (and competitive entry into Connecticut would be easier) because of the merger – in fact, it now appears that the opposite is true.

2. Unnerving Nine Month Delay in Applicability.

SBC-Ameritech provide no explanation as to why the obligation to pay liquidated damages and voluntary public interest payments will not attach until "9 months after the

Merger Closing Date" (Paragraph 2.a, and 2.c) in most of its states (except Connecticut, where, inexplicably, CLECs must wait an additional six months). Covad interprets this offer as evidence that SBC and Ameritech do not believe that they can now provide CLECs with nondiscriminatory access and interconnection immediately and that they now need "some time" to bring their performance up to snuff.

This is, in essence, a tacit admission that SBC and Ameritech have not to date devoted sufficient corporate attention and resources to providing parity service to CLECs. If so, this is a very disturbing revelation that the Commission must address immediately, prior to the Merger Closing Date. Indeed, should the Commission condition approval of this merger upon a promise by SBC and Ameritech to bring their CLEC performance into compliance with the law at some time in the future? Can such a condition indeed be legitimately considered a "public interest benefit" of the transaction? Covad strongly believes that a promise to come into compliance with the law should be granted no public interest weight at all. At a minimum, the Commission should insist that the obligations to make payments under the plan attach immediately upon implementation of the plan.

3. Backsliding on Texas, California, Nevada, Ohio and Illinois Commitments.

It should be noted for the record that SBC-Ameritech compliance with 79 of those 129 Texas standards were recently ordered by the Ohio Commission in connection with this same merger, and that SBC-Ameritech recently proposed to provide 79 of the Texas standards in the pending Illinois merger proceeding (although there is no word on whether these will be the same 79 standards ordered by Ohio). In California and Nevada,

the state commissions have ordered similar but more comprehensive service standards.[9] SBC-Ameritech (and the Commission) needs to provide an explanation as to why only 20 of the 129 Texas service standards are proposed by SBC-Ameritech in this proceeding. If the Commission adopts the plan as a merger condition, the Commission must provide a reasoned basis for selecting the 20 measurements that were selected, for rejecting the other 109 Texas measurements, and for rejecting the California and Nevada measurements and benchmarks.

4. The Collocation Benchmark Measurement 19 is Insufficient.

The proposed parity or benchmark for collocation does not approximate a reasonable estimation of damages incurred by CLECs for SBC-Ameritech breaches of these intervals. For example, consider the following hypothetical CLEC that has applied for collocation in one hundred offices in Missouri. Under the SBC-Ameritech proposal, no liquidated damages or public interest payments would be made if SBC-Ameritech, without explanation, *never* provides five of the 100 collocation spaces – even if the CLEC has paid for those five spaces.[10] Since it is impossible for CLECs like Covad to provide facilities-based xDSL service to consumers without establishing a collocation arrangement in the local neighborhood office, any ILEC failure to turn over collocation space is unacceptable. The Commission should amend the benchmark in Measurement 19 to 100% compliance.

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[9] For example, in California, the "parity" interval for Firm Order Commit (FOC) returns for an electronically-submitted UNE loop order is 10 minutes. In SBC-Ameritech's proposal, this interval is five hours.

[10] This is because the collocation "parity" benchmark in Measurement 19 is 95% on-time performance.

An alternative would be to rewrite the business rules and calculations of Measurement 19 to increase the significance in the calculation of a collocation space that is late more than one month. For instance, a collocation space that is two months late could be counted as *two* "missed due dates" in the Measurement 19 calculation. A space three months late would then be counted as *three* "missed due dates." The result would be to create an incentive for SBC-Ameritech to fix already-late cages as soon as possible. This method would also prevent SBC-Ameritech from totally escaping liability by failing to provide any particular collocation space.

5. Parity Benchmarks for DSL-loop Measurements must be SBC-Ameritech retail DSL service.

In several places, the benchmarks for DSL-loop installation and repair measurements do not compare service to SBC-Ameritech's retail DSL service – the most logical retail service comparison. For instance, the parity benchmark for Measurement 2c (which also serves as the parity benchmark for Measurements 3c, 5c, 9c, 10c, and 11c) lists the parity "benchmark" for delivery of an unbundled DSL loop as SBC-Ameritech's retail provision of a DS1 or a T1 line – *not* SBC-Ameritech's provision of a retail ADSL line. SBC-Ameritech provide no reason for their refusal to provide the obvious retail analog as the benchmark. Indeed, no logical reason can be given for failing to use the appropriate parity measurement.

6. Installation and Repair Timelines for UNEs (Measurements 2a, 2b, 2c, 2d, 4a, 4b, 4c, 5a, 5b, 5c, 6, 10a, 10b, 10c) should provide for CLEC acceptance of a functioning UNE.

The business rules for various Measurements that relate to UNE installations and repair functions contain one significant flaw – the clocks on SBC-Ameritech's interval do not appear to be triggered upon acceptance of a functioning UNE by the CLEC.

The whole point of this proposed performance plan is to ensure that SBC-Ameritech installs and repairs elements and services in a timely manner. As a result, it is critical that the "stop clocks" for the measurements – the events that indicate that SBC-Ameritech has successfully completed a task – be meaningful and easily measured. Unfortunately, throughout the measurements, there are ambiguous and sometimes inconsistent time periods for "stopping the clock" on these measurements.

For instance, the "completion date" for average installation interval for a DSL loop measurement (No. 6) "is the day that SWBT [sic] personnel complete the service order activity." Identical phraseology is used in Measurements 2a, 2b, 2c, 4a, 4b, 4c, and 5a. Measurements 5b and 5c refer only to the "completion date", an undefined term in those business rules. The clock in Measurement 10a stops when SBC-Ameritech personnel "clear the repair activity and complete the trouble report in WFA", the Measurement 10b clock stops "when the report is closed in WFA," and the Measurement 10c clock stops "when the report is cleared in WFA."

Covad is concerned that SBC-Ameritech will interpret these ambiguous and inconsistent stop clock triggers in a manner designed to avoid penalty payments. For instance, what is the difference between "completing", "closing", or "clearing" a trouble report in the WFA? What happens if SBC delivers a "faulty" loop to Covad – have SBC personnel "complete[d] service order activity"?[11] Will the Commission resolve disputes around this phrase?

Covad proposes one simple business rule for these measurements. For installation measurements, the completion date should be "the date on which SBC-Ameritech

[11] Certainly not, in Covad's opinion.

delivers to the requesting CLEC, and the CLEC accepts, a fully functional UNE or service that meets the UNE or service ordered by the CLEC." For repair measurements, the completion date should be "the data on which SBC-Ameritech restores, and CLEC accepts, its provision of a fully functional UNE or service to requesting CLEC that meets the original UNE or service ordered by the CLEC." Covad believes that these modifications to the business rules would unify and greatly clarify the "stop clock triggers" for these critically important UNE delivery and repair measurements. It would also predicate these triggers upon acceptance by the CLEC of the completed UNE or service – a result consistent with contract law, in which a sale of goods or services is not final until the customer accepts the goods or services.

7. Collocation (Measurement 19) Business Rules should provide for CLEC acceptance of functioning collo space.

Covad has experienced many times that an ILEC will "rush" to meet a collocation installation interval and "turn-over" a nonfunctional or incomplete collocation space. Although ILECs tend to think about this collocation turn-over as "meeting" their interval, Covad strongly disagrees. Indeed, common business practice would not consider a collocation interval to have been met until the CLEC receives and accepts fully functional collocation space that meets the CLEC's ordered specifications.

The business rules of Measurement 19, which stops the clock "when the collocation cage [sic] is complete and ready for CLEC occupancy", should be tightened as follows: "The clock stops when SBC-Ameritech provides the CLEC, and the CLEC accepts, a fully functional collocation space that meets the complete specifications of the CLEC's collocation order." In addition, the proposed business rule that permits SBC-Ameritech to change the business rules through tariff should be deleted, because it would

give SBC-Ameritech and a state commission the ability to change these collocation business rules at any time – a result inconsistent with a "federal performance parity plan."

8. Billing Measurement (Measurement 20) must provide for accurate bills.

This measurement only determines whether SBC-Ameritech has sent a bill within six business days of the billing closing date. In no way does it provide an incentive for SBC-Ameritech to provide the CLEC an *accurate* bill.

Covad proposes that business rules for the billing measurement (No. 20) read: "This measure counts the number of workdays between the bill day and date on which SBC-Ameritech transmits to the CLEC a complete and accurate bill."

B. Collocation Compliance Plan (Proposed Condition II)

Covad commends FCC Staff for its continued focus on collocation issues – especially with regard to enforcement of the *Second Advanced Wireline Services Order*. Covad supports an independent audit of SBC's and Ameritech's compliance with those rules (which went into effect on June 1, 1999) and believes that this audit process can be a very beneficial process for all parties. As a result, Covad encourages the Commission to consider engaging similar auditors to review compliance by other incumbent LECs, in particular Bell Atlantic, GTE and BellSouth, each of whom have shown recalcitrance in implementing the *Second Advanced Wireline Services Order*.

That said, Covad has several comments on SBC-Ameritech's July 1 Proposal. In several ways, this proposal does not live up to the FCC Staff's June 29 Condition No. 8 (Collocation Compliance).

1. Ameritech Collocation Practices do not Comply with the *Second Advanced Wireline Services Order*

The June 29 Condition No. 8 (Collocation Compliance) clearly describes that the impact of the FCC's new collocation rules was to "reduce costs and delays faced by competitors seeking to collocate." Paragraph 4 of the SBC-Ameritech proposal states that prior to the Merger Closing Date, SBC and Ameritech will amend their tariffs or offer to amend interconnection agreements "to bring SBC/Ameritech's provision of collocation into compliance with the Commission's governing rules."

Setting aside the obvious issue as to whether a commitment to come into compliance with current law should be given *any* public interest weight, it is clear that as of this writing, Ameritech has not satisfied the goal of offering interconnection agreement amendments that fully incorporate the *Second Advanced Wireline Services Order*.

Attachment 3 to these Comments is Ameritech's "proposed interconnection amendment" that Ameritech posted on its wholesale CLEC website (TCNET) on June 9, 1999 (eight days after the June 1, 1999 effective date). Ameritech has stated that it intended only to keep this Amendment posted on TCNET only until July 17, 1999.

Based on discussions between Ameritech and Covad employees, it is apparent that Ameritech believes that because it has posted this generic amendment, it is now in compliance with the FCC Rules. That is far from the case, because there are three major problems with Ameritech's proposed "generic" amendment:

First, the Ameritech Proposed Amendment requires CLECs to make other significant and unrelated substantive concessions as a condition of obtaining alternative collocation amendments. For instance, as a condition of receiving cageless collocation, the proposed amendment –

- Requires CLECs to agree to pay conditioning charges for DSL-capable loops. *See* Attachment 3 at 3 (Section 2.4). Most of Ameritech's current interconnection agreements state that Ameritech will provide 2-wire ADSL and HDSL loops without mentioning any such conditioning charges. Essentially, Ameritech is improperly attempting to require data CLECs to accept a new cost structure for obtaining DSL loops as a condition of obtaining collocation as ordered by the Commission on March 31, 1999.

- Requires CLECs to sign onto a DSL spectrum interference indemnification policy that is inconsistent with the interim DSL spectrum management policy adopted by the FCC in the *Second Advanced Wireline Services Order*. *See* Attachment 3 at 3, Section 2.4.[12]

- Requires CLECs to accept inferior installation intervals when a CLEC places orders for multiple collocation arrangements. *See* Attachment 3, Proposed Amendment Section 12.14.1(b). Under its current agreements, Ameritech will provide its initial space availability response to a collocation application within ten business days. Ameritech's proposed amendment would extend that interval potentially by months if a CLEC files several applications on one day.[13] The FCC's new collocation rules were all about making collocation faster and less expensive – instead of implementing that Order faithfully, Ameritech actually has proposed to *extend significantly* its interval.[14]

Second, Ameritech's proposed implementation of alternative collocation arrangements does not incorporate several clear rules promulgated in the *Second Advanced Wireline Services Order*. For instance,

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[12] Indeed, although Ameritech's Proposed Amendment purports to incorporate necessary changes resulting from the *Second Advanced Wireline Services Order*, in no place does the Proposed Amendment implement the Commission's interim spectrum management policy. The Commission should insist that Ameritech implement this interim policy in its agreements and tariffs prior to the merger closing date.

[13] For instance, if a CLEC applied for 50 collocation arrangements on one day, Ameritech would not have to provide a space response on *any* of the applications for fifty-five business days – or nearly three months. This one change alone would significantly delay the roll-out of broadband services by a CLEC like Covad, which engages in "blanket" collocation in each market it enters.

[14] Ameritech may argue that it needs this change because its current collocation staff is not equipped to handle dozens of collocation requests. If that is true, the proper response is *not* to delay CLEC entry but for Ameritech to devote more resources to collocation support staff. Indeed, if Ameritech claims that its current staff is unable to handle CLEC demand for collocation, the Commission should launch an enforcement investigation immediately. The Commission must not countenance any LEC's decision to devote insufficient resources to fulfilling its collocation obligations.

- Commission rules require that cageless collocation be offered in any "unused space in a central office." Ameritech's proposed definition of "unused space" permits it to exclude central office space for its own use, including administrative space, and conference rooms from this definition of "unused space." Attachment 3 at p. 2 (Section 2.2). As a result, Ameritech could shut down CLEC entry into an office by simply converting empty space into conference rooms or reserving an empty floor for a "future switch."

- Commission rules require that CLECs have direct, 24x7 access to collocated equipment through a central entryway, without either a security escort of any kind or otherwise delaying entry into the premises. In addition, Ameritech is only permitted to impose security arrangements that are as stringent as the security arrangements that Ameritech already maintains at its premises for its own employees or authorized contractors. In several cases, Ameritech's proposed security arrangements for CLECs are more restrictive (Section 12.12.2). For example –

  - In Section 12.12.2, Ameritech's proposal still requires escorts

  - In Section 12.12.1, Ameritech's proposal would have CLECs pay for all security arrangements that "have concomitant benefits of providing necessary protection of Ameritech's equipment." This requirement of making CLECs pay for providing "protection" to Ameritech's equipment is clearly discriminatory.

  - In Section 12.12.3, Ameritech reserves the right to impose at its option one of a number of security arrangements (including, ironically, caging off its own equipment). This proposal ignores the fact that Ameritech's legal requirement is to put in place nondiscriminatory security requirements for CLEC access that it currently employs for its own employees and contractors – the rules do not contemplate that Ameritech establish new security rules for CLECs.

- Commission rules forbid Ameritech from placing any limitations on the ability of Requesting Carrier to use all of the features, functions, and capabilities of equipment collocated, including, but not limited to, switching and routing features and functions and enhanced services functionalities. Ameritech's proposed amendment (Attachment 3, Section 12.6.1) places severe restrictions on the ability to collocate advanced services equipment – in particular, Ameritech would prohibit a CLEC from collocating equipment "that has stand alone switching or enhanced service functionality that is then connected in Ameritech's Premises to other equipment necessary for Interconnection with Ameritech or access to Ameritech's unbundled Network Elements." In short, Ameritech will

permit a CLEC to collocate a piece of equipment with switching functionality, but it must be the *only* piece of equipment that is connected to the Ameritech network – a preposterous proposal.[15]

- Commission rules state that an ILEC may not require a CLEC to use an intermediate interconnection arrangement in lieu of direct connection to Ameritech's network if technically feasible. Ameritech's proposed amendment does not incorporate this requirement.

- Ameritech's proposal forbids the conversion of virtually collocated equipment to cageless physical collocation. (Attachment 3, Section 12.2.4.) Ameritech's current agreements *do* permit parties to convert virtual equipment to physical – Ameritech's decision to ban conversions is a strange reaction to the *Second Advanced Wireline Services Order*.

- With regard to adjacent collocation, Commission rules state that Ameritech is to provide power and physical collocation services and facilities, subject to the same nondiscrimination requirements applicable to other physical collocation arrangements. Ameritech's proposal (Attachment 3, Section 12.3.2) does not provide for these assurances.

- The rules require that Ameritech not impose safety standards on collocated equipment more stringent than it does for its own equipment. Ameritech's proposal (*see* Sections 12.6.2-4) does not contain such a commitment.

- Commission rules require that when Ameritech rejects a piece of equipment on account of safety standards, it must provide a list of all Ameritech equipment located on the premises and demonstrate that all of that equipment meets or exceeds the safety standard that the CLEC's equipment fails to meet. Ameritech's proposal (Attachment 3, Section 12.6.2(b)) only obligates Ameritech to list equipment that are "placed in the network areas of such Premises."

- The rules permit CLECs to cross-connect with one another on an ILEC premises to provide their own equipment or cross-connect capabilities. Ameritech's proposal (Attachment 3, Section 12.8) appears to require cross-connecting CLECs to lease Ameritech cable rack and/or riser space.

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[15] The equipment a DSL provider collocates comes from a variety of vendors. For example, in Covad's network, a DSLAM connects to the unbundled loops, ATM cross-connect and multiplex equipment connect to the DSLAM, and the ATM/multiplex equipment connects to unbundled transport. In addition, a router, which helps Covad guarantee service quality, sits between the DSLAM and unbundled transport. Under Ameritech's silly proposal, Covad may not be able to collocate *any* of this equipment: because all pieces of equipment (DSLAM, ATM and router) are connected to another piece of equipment that is connected to UNEs provided by Ameritech.

- Commission rules require that adjacent collocation be made available if no space for physical collocation exists in an office. Ameritech's proposal (Attachment 3, Section 12.3.2) would require a CLEC to apply for virtual collocation prior to permitting adjacent collocation. As the Commission recognized in the March 31 Order, most CLECs do not prefer virtual collocation because it forces them to cede control over operation and maintenance of the collocated equipment.

- The rules require that Ameritech post on a publicly available Internet site a report that identifies each Ameritech Premises for which physical collocation is unavailable because of space limitations, and that this report must be modified within 10 calendar days of any change in that office. Ameritech's proposal (Attachment 3, Section 12.10.1) only obligates it to update these reports within 10 business – not calendar – days.

- Commission rules require that within ten days of a CLEC's request, Ameritech will provide a premises report that will include the amount of physical and virtual collocation space in the premises, the number of collocators on the premises, modifications in the space since the last report, and describe measures Ameritech is taking to make additional space available for physical and virtual collocation. Ameritech's proposal (Attachment 3, Section 12.10.2) only requires it to provide a report on the amount of physical collocation space; Ameritech has not proposed to make such report available within ten calendar days.

- Commission rules require Ameritech, after rejecting a physical collocation application on account of space, to offer the CLEC a tour of the entire premises within 10 calendar days. Ameritech's proposal (Section 12.10.3) would only provide this tour for offices that are not listed in Ameritech's "Exhaustion Report." Ameritech's interpretation of its obligations is entirely improper – its obligation is to provide tours, at no cost to the CLEC, within 10 calendar days each time a CLEC is denied space. In addition, Ameritech has proposed that CLEC tour participants execute a protective order prior to taking the tour. Since the purpose of the tour is to speed resolution of space disputes before the appropriate regulatory authorities, a protective order must not forbid CLEC representatives from sharing their impressions of the tour with state and federal authorities.

- Commission rules require Ameritech to submit detailed floor plans or diagrams to the appropriate state commission *each time* it denies a physical collocation application. Ameritech's proposal (Attachment 3, Section 12.10.5) would require Ameritech only to submit those floor plans or diagrams only after a CLEC files a complaint with the state Commission about Ameritech's collocation practices.

Third, the nonrecurring rates Ameritech has proposed for cageless physical collocation (Attachment 2, Attachment B) are plainly inconsistent with the Commission's goal in the *Second Advanced Wireline Services Order* to make collocation less expensive. Logic would dictate that the nonrecurring charge for cageless physical collocation would be considerably less than the cost of caged physical collocation, because CLECs no longer need pay for the construction of a partition or cage to separates CLEC equipment from the ILEC equipment. Yet under Ameritech's proposal, cageless physical collocation in four of the five Ameritech states costs *substantially more* than caged collocation.

Table 1 demonstrates this point vividly. Indeed, it shows that in Michigan, Ameritech's cageless price for six cageless bays (apx. 20 square feet of actual floor space) is *twice* the cost of a 100 square foot cage.[16] Ameritech's collocation prices are clearly inconsistent with the intent of the Commission's new collocation rules.

Despite requests from Covad, Ameritech has refused to provide any cost support for these cageless collocation prices. Ameritech's response has been that Covad is free to request the state commission to arbitrate these prices if Covad believes that the prices are too high. In the meantime, Ameritech will not begin to construct or provide cageless physical collocation arrangements until the CLEC executes a final, signed interconnection amendment. The net result is more litigation and delay – directly contrary to the public interest and the Commission's March 31 Order.

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[16] Six bays constitute a standard configuration in a 100 square foot collocation cage.

Table 1. Comparing Order and Build-Out Costs of Ameritech's (6-bay) Cageless Prices with Cage-Based (100 sq. ft.) Prices

NRC Element	Illinois		Indiana		Michigan		Ohio		Wisconsin	
	Caged	*Cageless*	*Caged*	*Cageless*	*Caged*	*Cageless*	*Caged*	*Cageless*	*Caged*	*Cageless*
Order Charge	$302.30	$298.76	$274.59	$297.47	$123.17	$299.54	$277.21	$307.13	$278.16	$290.03
CO Build Out for 6 Bays cageless or 100 sq. ft caged	33,788.47	29,352.05	31,913.53	35,177.59	12,482.36	37,523.48	28,861.46	34,366.18	27,976.09	41,663.76
Total	34,790.77	29,650.81	32,188.12	35,475.06	12,605.53	37,823.02	29,138.67	34,673.31	28,254.25	41,953.79
% Cageless *Savings* or Mark-Up		*15% cageless savings*		**10% cageless mark-up**		**200% cageless mark-up**		**19% cageless mark-up**		**48% cageless mark-up**

Sources: Ameritech Interconnection Agreements and Tariffs; Ameritech June 9, 1999 Proposed Generic Interconnection Agreement Amendment

AVERAGE CAGELESS MARK-UP IN AMERITECH REGION: 52.4%

In conclusion, Ameritech simply has not implemented the collocation provisions of the *Second Advanced Wireline Services Order*. Ameritech's proposal ties the availability of cageless collocation to other substantive interconnection concessions by CLECs (e.g., CLEC agreement to permit Ameritech to impose a new conditioning charge for DSL loops and vastly extended time lines for collocation space delivery). Second, Ameritech's amendment proposal is incomplete in many respects and directly contrary to the new Commission rules in other respects. Finally, Ameritech has proposed prices for cageless that contain, inexplicably, a significant 52% mark-up over comparable work for cage-based collocation. By refusing to provide cost support for those prices, CLECs once again must choose between building a network or arbitration.

This is not the type of "compliance" the Commission should expect from a party seeking approval of a multi-billion dollar merger with SBC. The Commission must scrutinize Ameritech's proposed "generic amendment" carefully and require Ameritech to offer immediately an alternative amendment that does comply. Absent such immediate intervention, Paragraph 4 of SBC-Ameritech's July 1 Proposal has no meaning at all, and any public interest weight given to this condition will be fundamentally unsound.

2. The Independent Collocation Audit Process Should be Modified to Promote Open Review of SBC-Ameritech Collocation Practices

Covad believes that the independent collocation audits (¶¶ 5-7) could generate public interest benefits, provided that the audit is open and that the Commission swiftly utilizes the results of an unfavorable audit to impose fines and forfeitures on SBC-Ameritech for noncompliance. Covad's principal issue with the current audit proposal is that the audit would be conducted in secret, that participation by CLECs in the audit

process will be at the sole discretion of the auditor, and that no penalties, fines or forfeitures appear to be contemplated in the event the audit finds that SBC-Ameritech are not in compliance with FCC collocation rules.

a. The Audit Must Include Public Review at All Stages.

SBC-Ameritech's compliance with FCC collocation rules is highly important to the public interest. For this reason, the work plan, interim results, and final results of the independent auditor should be open to public scrutiny. Unfortunately, SBC-Ameritech's proposal would keep the audit requirements, results and findings of this audit a complete secret until the final report is issued (*see* ¶ 6).

An open audit process, in which the work plan, audit requirements and interim findings are open for review at periodic stages (similar to the KPMG audit of Bell Atlantic's OSS in New York) will be ensure that this audit works to ensure compliance with the FCC collocation rules. Covad recommends that –

- Paragraph 6(a) be amended to provide the opportunity for public comment on the preliminary audit requirements and that the Commission be given the ability to approve or reject the requirements of the audit or changes to the audit requirements.
- Paragraph 6(e) should require the auditor to file a set of interim findings 8 months after the Merger Closing Date with the Commission, on which the Commission should seek public comment. Release of interim findings will facilitate an open process so that CLECs may be assured that their particular collocation issues will be addressed by the audit.
- Paragraph 6(g) should permit public access to the working papers and supporting materials of the auditor (subject to appropriate protective order).
- Paragraph 7 should be deleted. In no way should the Commission waive its right to conduct its own audit of SBC-Ameritech collocation practices. Paragraph 7 is patently inconsistent with Paragraph 63.

b. The Pre-Merger Attestation Must be Modified.

July 29 Condition No. 8 states that prior to the merger closing, independent auditors "will conduct a review to determine whether SBC and Ameritech have in place in each of their states methods and procedures to ensure compliance with the FCC's recent rules that reduce costs and delays faced by competitors seeking to collocate in an incumbent LEC's central office." The July 1 attestation form (Attachment B) is not consistent with the text of the June 29 Conditions and seems to provide little if any comfort to the Commission on the current level of compliance by SBC and Ameritech.

In particular, SBC-Ameritech's draft attestation would only have the auditor attest that SBC and Ameritech have "policies and procedures", that are "in place" and "distributed", that are "*regarding* compliance with the Federal Communications Commission (FCC) collocation requirements." This requirement is significantly different than the June 29 Conditions. Covad submits that there is a large difference between SBC/Ameritech having a "policy and procedure in place *regarding* compliance" with FCC rules (July 1 draft attestation) and SBC/Ameritech having policies that "*ensue compliance*" with those FCC rules "that reduce costs and delays faced by competitors seeking to collocate in an incumbent LEC's central office" (June 29 Condition No. 8). As proposed by SBC-Ameritech on July 1, the auditor need not examine whether the SBC and Ameritech policies and procedures *ensure* compliance, and the auditor need not examine whether those policies and procedures have actually reduced the cost and time of collocation, both of which are required by the June 29 Conditions.

Covad proposes the following pre-Merger attestation form:

> We have examined [SBC/Ameritech's] (the Company) assertion that the Company and all of its subsidiaries and affiliates are currently in full compliance as of XXXX, 1999 with the Federal Communications Commission's (FCC) collocation requirements. The FCC's collocation requirements are contained in part in the FCC's March 31, 1999 First Report and Order and Further Notice of Proposed Rulemaking on Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147). The Company is responsible for ensuring that all of its local exchange carrier affiliates and subsidiaries are in compliance with these FCC rules.
>
> Our examination was made in accordance with standards established by the Ameritech Institute of Certified Public Accountants. We believe that our examination provides a reasonable basis for our opinion.
>
> In our opinion, the assertion by the Company that the Company, including all of its subsidiaries and affiliates, have in place in each of its states methods and procedures that ensure compliance with all applicable requirements in a manner that reduces costs and delays faced by competitors seeking to collocate in any of the Company's (and Company's subsidiaries and affiliates) central offices, as of XXXX, 1999, is fairly stated in all material respects.
>
> This report is intended solely for the information and use of the FCC with regard to CC Docket No. 98-141 and should not be used for any other purpose by the Company, or its subsidiaries or affiliates.

Covad believes that this attestation form more fairly accomplishes what June 29 Condition No. 8 was intended to accomplish.

c. The Audit Should Carefully Examine Collocation Prices

Table 1 (page 25 above) clearly demonstrates that the auditor must not only look at policies and procedures, but must also be empowered to examine SBC-Ameritech collocation pricing practices.[17]

As a result, Covad proposes that the collocation auditors have full access to cost support data for alternative collocation arrangements. In addition, to assist the audit, the cost support data provided to the auditor should also be made available to CLECs, the

[17] Although Table 1 describes Ameritech collocation prices only, the auditors also should examine collocation pricing in current SBC states.

Commission, and state commissions. Until the auditor's review is complete, all rates paid for any form of collocation ordered by a CLEC in the SBC-Ameritech region should be subject to a subsequent true-up.

In addition, where CLECs pay for collocation on an "individual case basis", Covad is very concerned that SBC and Ameritech (and other ILECs) may not be keeping detailed records of actual work done for the CLEC in that particular instance. As a result, Paragraph 6(c) should be clarified to ensure that "access to books, records, and operations of SBC/Ameritech that are necessary to fulfill the audit requirements" include actual construction, contractor or supply invoices, price quotes, and a complete account for time and materials spent in providing collocation services. These records should also be made available to CLECs and state commissions.

C. OSS Enhancements and Interfaces (Proposed Condition III)

As shown by Attachment 1, the timelines in SBC-Ameritech's OSS proposals make many of these commitments a near-nullity, and the method of implementing these enhancements would severely restrict the rights of CLECs. As a result, SBC-Ameritech's Proposed Condition III has only scant public interest benefits as, once again, SBC-Ameritech try to wiggle out of the June 29 FCC Staff agreement. Indeed, this proposal may adversely impact the public interest – because the presence of multistate OSS "workshops" may cause state regulators to shy away from developing general rules that fix obvious and well-known existing problems with SBC and Ameritech OSS.

1. Laggard Timelines Render Many Obligations Meaningless.

Because most of the merger conditions expire in three years, many of the new OSS "enhancements" and interfaces will only be available for a year or less – because

SBC-Ameritech gives itself two years to deploy them. The Commission should question as to whether it would make any sense for a CLEC to spend two years designing an interface around an OSS functionality that SBC-Ameritech can stop providing one year later.

In addition, SBC gets unexplained "extensions" for implementing these OSS interfaces in Connecticut. Covad is aware of no record evidence to justify this extension. The Commission should seriously think about the apparent fact that in Connecticut, SBC is farther from compliance with the 1996 Act than in other SBC states.

2. Limitation of CLEC Due Process Rights.

For several OSS "enhancements" (¶¶ 11, 14, and 16), CLEC participation in the process is limited to one month of negotiations in "Phase II." During this one month period, CLECs must decide whether to reach a "written agreement" with SBC-Ameritech "on the work to be done." If the CLEC does not agree to sign SBC-Ameritech's offer, the CLEC's only recourse is to request binding commercial arbitration of the dispute – but only if the Chief of the Common Carrier Bureau believes that arbitration is proper. CLECs have no input into selection of the arbitrator. Indeed, the arbitrator is not even independent, as it is required to act "in consultation with subject matter experts selected from a list of three firms supplied by SBC/Ameritech." CLECs cannot appeal the results of this arbitration, yet must pay 50% of the cost of the proceeding.[18]

This arbitration process would heavily infringe the due process rights of CLECs. In particular, CLECs are denied the opportunity to submit these OSS disputes to any competent forum (be it the FCC, a state commission, or a court of competent jurisdiction)

[18] An identically prejudicial arbitration process is proposed by SBC-Ameritech in Paragraph 15.

and must instead submit the dispute to an arbitrator that is required to "consult" with a list of SBC-Ameritech pre-approved "subject matter experts." The CLEC cannot appeal the final decision of this arbitrator. And any arbitration only cuts into the very limited time that SBC-Ameritech are to make these enhancements available in the first place – thus, if an arbitration or dispute lasts one year, SBC-Ameritech's obligations to provide these OSS enhancements and interfaces will disappear entirely.

The end result of this kangaroo court process will be an utter lack of meaningful CLEC participation. SBC-Ameritech will be have an incentive to make the proposed Plan of Record (developed in Phase I) as milquetoast as possible, because SBC-Ameritech will know that CLECs have a strong incentive either to ignore Phase II entirely or to accept whatever SBC-Ameritech proposes simply to keep the process moving along. Most importantly, CLECs can only enforce SBC-Ameritech's eventual compliance with this plan (¶¶ 11(c), 14(c), 15 and 16(c)) through the same prejudicial arbitration process.

The Commission cannot countenance this severe restriction of CLEC substantive and procedural rights. If SBC-Ameritech fails to comply with any condition of this merger (such as by not implementing the promised OSS enhancements and interfaces), CLECs have the statutory right either to file a Section 208 complaint before this Commission or to sue for damages pursuant to Section 209 of the Act. SBC-Ameritech's actions may also violate existing and binding interconnection agreements with CLECs, which may be enforced in a variety of judicial fora. While the Commission can certainly require SBC-Ameritech to *offer* CLECs binding commercial arbitration of disputes at the option of the CLEC (as Proposed Condition XII does), in no way can the Commission in

this proceeding take away statutory rights and other methods of legal recourse from CLECs.

As a result, Covad proposes that all but the first sentence of Paragraphs 11(b), 14(b) and 16(b) be deleted. Paragraphs 11(c), 14(c) and 16(c) also should be modified to give CLECs the option of seeking enforcement not only through commercial arbitration but also through "any forum of competent jurisdiction." In addition, the Commission also should make clear that the primary jurisdiction doctrine does not require that the Commission be the sole forum to resolve these disputes.

3. Access to SORD is Unreasonably Limited.

As SBC-Ameritech have drafted it, Paragraph 12 contains a logical disconnect. Essentially, SBC-Ameritech have proposed that they will "offer to develop . . . direct access to SBC's SORD system . . . provided [that] . . . SBC/Ameritech and the CLEC agree to . . . the precise nature of the SORD . . . functions that shall be provided by SBC/Ameritech." In short, SBC-Ameritech has stated that it will "offer to develop" whatever access to SORD that it "agrees" to provide. That is not much of a promise – indeed, it is not even a statement that has any logical meaning or content.

Even so, SBC-Ameritech's vapid "offer to develop" still requires CLECs to pay the costs of this development effort. In doing so, Paragraph 12 builds in a tremendous "first-mover" disadvantage: the first group of CLECs that request SORD access must pay the full cost of development, but once developed, access by subsequent CLECs is free. This results in a strong disincentive for CLECs to request this access immediately and may cause delays in CLEC requests for access. Of course, that outcome is fine by SBC-Ameritech, because it only has to offer this access for 30 months.